



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 31 OF 2017

COSMAS KYULE NGUNUU.....APPLICANT

VERSUS

PERMANENT SECRETARY, MINISTRY OF HOME AFFAIRS

ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By way of a Notice of Motion dated 3rd May 2017 brought under Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act, the Applicant seeks the following orders:

- a. THAT the Applicant be granted leave to file an appeal out of time against the Ruling of Hon. Magistrate H. Nyakweba dated 23rd November, 2016
- b. THAT the Honourable court do grant any other orders it may deem fit in the matter.
- c. THAT costs of this application be provided for.

The application is premised on the grounds set out therein and those in the supporting and supplementary affidavits of COSMOS KYULE NGUNUU sworn on 3rd May, 2017 and 13th October, 2017 respectively.

2. The Applicant alleges that he was aggrieved by the decision of Hon. Nyakweba delivered on 23rd November, 2016 in Mombasa RMCC Case No. 1057 of 2009- Cosmas Kyule Ngunuu versus Permanent Secretary, Home Affairs and Another, and wished to lodge an appeal. However, the Applicant claims that he was not able to lodge the appeal on time due to health problems sustained whilst in custody and also the delay in acquiring the typed copies of the proceedings. The Applicant contends that he should be allowed to file an appeal out of time.

3. It is the Applicant's case that the Appeal has a high chance of success and if the prayers sought are not granted, he will suffer substantial loss.

Response

4. The Respondents opposed the application by way of grounds of opposition filed on 25th July 2017. The Respondents aver that the intended appeal has no chance of success hence the application is frivolous and vexatious. Further, the Respondents contend that the Applicant is guilty of laches.

Hearing

5. The application came up for hearing on 10th April, 2018. Ms. Mbogoh appeared for the Applicant while Ms. Waswa appeared for the Respondents.

6. Ms. Mbogoh submitted that the Applicant seeks leave to appeal out of time against the Ruling delivered on 23rd November, 2016 in Mombasa RMCC Case No. 1057 of 2009- Cosmas Kyule Ngunuu versus Permanent Secretary, Home Affairs and Another. Counsel

contended that the reason for delay in lodging the appeal was that the Applicant was unwell and could not avail himself to his advocates to give instructions. Further, Counsel submitted that the intended appeal was meritorious, with a high chance of success.

7. On the other hand, Ms. Waswa submitted that the application was an afterthought and the reason given for the delay was not justifiable. Counsel urged this court to consider that this application was brought 120 days after the Ruling which is the subject of the intended appeal hence the application ought to be dismissed.

Analysis and Determination

8. The only issue for determination by this court is whether the Applicant should be granted leave to appeal out of time.

9. Section 79G of the Civil Procedure Act provides as follows:

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

10. An appeal to this court from a subordinate court is required to be filed within 30 days from the date when the order or decree is made. However, this court has the discretion to admit an appeal out of the stipulated time.

11. Section 7 of the Appellate Jurisdiction Act grants the High Court the power to extend time in relation to an appeal as follows:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

12. The Applicant seeks leave to appeal out of time the Ruling delivered on 23rd November, 2016 in Mombasa RMCC Case No. 1057 of 2009. The reason for the delay, the Applicant contends, was the state of his health which impeded him from giving instructions to his advocates. The Respondents on other hand, dispute this reason. They claim that it is not a sufficient reason to reconcile the delay of almost 120 days.

13. The principles for grant of leave to file an appeal out of time were considered in the case of **Stanley Kahoro Mwangi & 2 others vs. Kanyamwi Trading Company Limited [2015] eKLR** where the court observed as follows:

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

The parameters for the exercise of such discretion are clear. See **MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486** and **FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported)** where this court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.” (emphasis added)

14. These principles can be summed up as; the period of delay and the reason for the delay; the chances of the appeal succeeding, whether the Respondent will be prejudiced if the application is allowed and the effect of the delay.

15. The Ruling which is the subject of the intended appeal was delivered on 23rd November, 2016. The application for leave to file the intended appeal out of time was filed on 15th June, 2017, almost six months from when the ruling was delivered. The prescribed period for lodging an appeal is 30 days from the date of the decision. The delay by the Applicant is of more than 150 days. This is a considerable delay.

16. The Applicant contends that the delay was occasioned by his ill health and the length of time it took to acquire typed proceedings that were to be used in the record of appeal. The Respondents do not appreciate the reason given by the Applicant and contends that the Applicant was not unwell.

17. I have perused the application and the documents annexed thereto. Several treatment notes and receipts have been annexed to the affidavit of COSMAS KYULE NGUNUU sworn on 3rd May, 2017 and marked as “CKN 1”. The Respondents claimed that some of the treatment notes pre-dated the ruling hence their assertion that the Applicant is not well. I do agree with the Respondents. Indeed some of the treatment notes are dated well before the Ruling was delivered. However, others reflect dates after the Ruling was delivered. This court finds no reason to dispute that the Applicant was unwell as the Respondents have challenged the Applicant’s submission that he was unwell. In the case of **APA Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR**, Justice Aburili observed as follows:

“Where there is delay which is explained and the court accepts that explanation in order to render substantive justice and to facilitate access to justice for all by ensuring that deserving litigants are not shut out of the Judgment seat, such leave ought to be granted”.

I do find the reason given by the Applicant for the delay to be sufficient.

18. Turning to the issue of whether the appeal had high chances of success. When the Applicant filed this application, he did not include a copy of the Memorandum of Appeal for the intended appeal. However, the same was annexed to the Supplementary Affidavit of COSMAS KYULE NGUNUU sworn on 13th October 2017 and marked as “CKN 2”. In the said copy of the memorandum of appeal, the Applicant raises three grounds of appeal. This court cannot discuss the merits of the grounds of appeal at this stage. However, I have read the three grounds of appeal and they raise issues which are worthy the consideration by an appellate court. As to whether the appeal will succeed, it would be premature to comment on this now. In the interest of justice, it would only be fair to allow the Applicant lodge the appeal and have it determined on its merits.

19. The Respondents have not indicated how they would be prejudiced if this appeal is allowed. This court cannot on its own conclude that the Respondents will be prejudiced if the application is allowed. On the contrary, this court opines that justice will be served to all parties if the Applicant is allowed to file the intended appeal.

20. For the foregoing reasons, the application dated 3rd May, 2017 is allowed. Orders are issued as follows:

- a. Time for filing the intended appeal is extended by 30 days from the date hereto.
- b. Costs to be in the cause.

Dated, Signed and Delivered in Mombasa this 25th day of June, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Makuto holding brief Mkok for Respondent

Ex parte Applicant in person

Mr. Kaunda Court Assistant